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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 499

OHIO FARMERS INSURANCE COMPANY,
OHIO FARMERS INDEMNITY COMPANY,
Petitioners and Appellees below,

vs.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, IMOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,
Respondents and Appellants below.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

A. This case is reported in 145 F. Supp. 770, and ..... F. 2d ..... The District Court's opinion appears in Appendix A at page 19. The Court of Appeals opinion appears in Appendix B at page 28.

B. (i) The judgment of the Court of Appeals was rendered and entered on June 27, 1957.

(ii) The Court of Appeals denied Petition for Rehearing on August 6, 1957.

(iii) The United States Supreme Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under the provisions of Section 1254(1), Title 28, United States Code, which provides as follows:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C. There are presented for review three questions:

1. Under Rule 52, F.R.C.P., can a Court of Appeals review the evidence, weigh the evidence, and, reverse the judgment of the District Court, when no motion to amend or make additional findings is filed in the District Court and no question is raised as to the sufficiency of the evidence to sustain the trial judge's findings of fact in the District Court or on appeal to the Court of Appeals.

2. Under the terms of a standard provision of automobile liability insurance policies known as Insuring Agreement VIII, and reading as follows:

> "This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the Policy Period while the automobile * * * is owned, maintained and used for the purposes stated as applicable thereto in the Declarations.",

does the insurance afforded apply to a collision and resultant losses which occur after the named insured, declared to be the insured automobile's sole owner, transfers all his right, title and interest to his minor son without notice to the insurer and without its approval being endorsed thereon as required by the policy, under applicable provisions of Indiana law.

3. Under the provisions of the standard omnibus clause in an automobile liability insurance policy, is a minor son of the insured who becomes the owner of the insured automobile without notice to or approval of the insurer, an assured because he lives under the parental guidance and control of the named insured, under applicable provisions of Indiana law.

D. There are no constitutional provisions, treaties, statutes, ordinances, or regulations affecting the questions presented.

E. This action was commenced in the United States District Court for the Northern District of Indiana, South Bend Division, on February 11, 1955. The plaintiffs are Ohio corporations having their home offices in LeRoy, Ohio, and the defendants are all citizens and residents of Indiana. The plaintiffs sought a declaratory judgment with respect to the applicability of an automobile liability insurance policy issued to the defendant, Ezra Lantz, to losses which occurred March 11, 1952, after the named insured had transferred all his right, title and interest in the automobile to his minor son without the companies' knowledge or approval. The District Judge entered judgment for the plaintiff on November 15, 1956, after trial by the court sitting without a jury. Findings of Fact and Conclusions of Law under Rule 52, F.R.C.P., were filed the same date. The issues were submitted in part upon the stipulation of the parties which established: That the Court had jurisdiction of the parties and the subject matter of the action; that on May 6, 1951, the plaintiffs and the defendant, Ezra Lantz, entered into a written insurance contract, appearing as Exhibit 1 in the record, which declared Ezra Lantz to be the sole owner of the automobile insured and which contained standard provisions respecting transfer of the automobile and insurance policy; that on February 16, 1952, Ezra Lantz transferred all his right, title and interest

in the insured automobile to the defendant, Robert L. Lantz; that on March 11, 1952, the defendant, Robert L. Lantz, operated said insured automobile into collision with another at the intersection of Highways 33 and 13 in Elkhart County, Indiana, and, other facts pertaining to the demands made by the defendants upon the plaintiffs arising out of said collision; and, in part, upon testimony of witnesses, Blosser, Ezra Lantz and Robert L. Lantz, as follows:

GRACE BLOSSER: I am Grace Blosser. I am an insurance agent and was in 1951. I am acquainted with Ezra Lantz. I sell for four companies now and sold for two in 1951. I received no notice of any kind from Ezra Lantz or Robert Lantz about the transfer of title to the automobile described in the insurance policy (Exhibit 1). I never received any instructions from the company which would indicate any such notice.

One of the companies I sell for is the Ohio Farmers Insurance Company, which includes the Ohio Farmers Indemnity Company. I was selling for them in 1951. I started with Ohio Farmers Companies in 1942 and have continued as agent for them ever since. I would say I am a general agent although I am not just sure what is meant by general agent. I have authority to issue policies without obtaining any further authority.

I recollect the facts and circumstances relating to the issuance of the insurance policy (Exhibit 1). I had known Ezra Lantz before for two or three years. I had not done any business with him other than insurance. Before May 6 or May 7, 1951, I had issued insurance to Robert Lantz with same coverages, same company, on an automobile. This insurance policy (Exhibit 1) was a new policy on a 1947 Chevrolet. I did not know anything about this car before I issued the policy. I would have had the title. It was in the name of Ezra Lantz. The broad coverage endorsement, Indiana, constituting part of Exhibit 1 con-

tains a provision with respect to driving by persons under age. At the time of the application for the policy I knew and was informed that Robert Lantz was going to drive this car. There is an additional premium charged by Ohio Farmers Companies if a minor is going to drive the car. In May, 1951, the Ohio Farmers Companies did not insure minors. The premiums due were paid when the policy was issued and then they paid possibly by the week or two weeks but not in accordance with the premium schedule. Robert Lantz paid on the premiums and Ezra Lantz paid on the premiums. They paid by cash.

The writing in the upper right hand corner "old policy number" refers to the fact that I had insurance on whatever car the Lantzes had before this automobile. There never was an automobile insured through my office to Robert Lantz. Ezra Lantz did not tell me in effect that the car was Robert Lantz'. I knew that Robert was a minor. I knew the car was being financed. I never saw any of the finance papers. I can't say whether Robert Lantz was present when this insurance was applied for. I cannot recall. I knew that Ezra Lantz helped pay for that insurance but I cannot recall dates or times. I wouldn't be able to say whether it was his money or Robert Lantz' money he used. On this particular occasion I informed Ezra and Robert Lantz, if he was present, that my company did not insure minors. I did have definite knowledge that this car was to be operated by Robert Lantz. I did not know that Ezra Lantz owned another automobile at that time.

EZRA LANTZ: My name is Ezra Lantz. My address is Shipshewana. I am the same Ezra Lantz that carried an insurance policy with the Ohio Farmers Insurance Company and the Ohio Farmers Indemnity Company in 1951. I am the father of Robert Lantz. I recall in March of 1950 when a 1947 Chevrolet was purchased for my son Robert's use. It was purchased from William Hostettler at Shipshewana.

He had had two cars before this one. He was eighteen at that time. The car previous to the one I have just testified about was purchased at Grover Brothers garage. The first one he had he bought from Blosser's at Shipshewana. That Blosser is related to Grace Blosser, the agent for the insurance company. At the time of the purchase of the first car I obtained insurance from Grace Blosser. The Blosser who sold the car was her husband. When I went to Mrs. Blosser for the insurance that time Robert was with me. I told Mrs. Blosser at that time I had purchased an automobile. When I came to the 1947 Chevrolet I talked to the same Mrs. Blosser about the circumstances of Robert's age and the desire of having a policy. She issued a policy on that car. She charged me an additional premium. The insurance was placed in my name. The car was not fully paid for. It was financed at Shipshewana State Bank. There was a notice signed there, we got money to pay for the car. I, Ezra Lantz, signed the note. Robert Lantz also signed it. The insurance company was advised of that. That insurance policy was renewed in 1951, I don't remember the exact date. I went back to Mrs. Blosser, the same circumstances were discussed. Robert Lantz paid the premiums on this policy in monthly payments. They were paid to Grace Blosser. I had my own car during all of this period. At the time of the last renewal of the policy in 1951, Robert was present with me. At the time the policy was taken out originally and at the time of the renewal of it, Robert was still to home with us. He was under my supervision and control. He was eighteen when this accident occurred in which Carol Yoder was involved.

Exhibit 1 is the policy I have been talking about. It was delivered to me and was in my possession up to the time this suit was filed.

Grace Blosser did the typing of the typewritten parts. I think this is Grace Blosser's signature.

I never paid any of the premiums on this insurance. Robert made all of the payments. I cannot remember that I ever took any of the insurance premiums to Grace Blosser for my son, Robert.

ROBERT LANTZ: My name is Robert Lantz. I am twenty-three. I live at Route 4, LaGrange, Indiana. I am now married. I reside at LaGrange with my wife. I was living north of Middlebury with my folks at the time I purchased the Chevrolet automobile which was involved in a collision with one Carol Yoder was riding in. I was not married at that time. I was eighteen on the date of this particular collision. I was eighteen May 24. I don't recall the date I purchased the automobile. I had owned it approximately six months at the time of the collision. I purchased this car from William Hostettler, Shipshewana. I had a trade-in. I went to Blosser's office with my father to get insurance for that automobile. I saw Mrs. Blosser there and discussed insurance with her. She prepared an application for insurance. My father signed it. The title to this car was in my father's name. It was necessary to finance the automobile. This was done at Shipshewana State Bank. I signed a note and mortgage there. My father signed that note for me. That note and mortgage was paid in November, I believe, some time after the accident with Carol Yoder I paid it. I paid the insurance premiums on the Chevrolet at Grace Blosser's office. I called at her office personally to make payment. All premiums were paid at the time of the accident. At the time this insurance was taken out I lived with my mother and father at Shipshewana. My father owned an automobile. At the time of the collision I lived at Shipshewana, the same place. At the time this insurance was taken out in Mrs. Blosser's office there was discussion about additional premium. She said there would be additional charge. An additional premium was paid by me.

I don't know how many premiums were paid on that policy issued in 1951. I believe it was paid around three times. I think it was paid in cash. The date of my birth is May 24, 1933.

Having received the stipulation and seen and heard witnesses, Blosser, Lantz and Lantz, the trial judge found that the Court had jurisdiction of the parties and the subject matter; that the insurance policy in question was issued May 7, 1951, at Middlebury, Indiana; that this policy covered an automobile titled in the name of Ezra Lantz and was issued to him as sole owner thereof; that on February 16, 1952, Ezra Lantz transferred to Robert L. Lantz all his right, title and interest in the insured automobile; that no notice of the transfer was given the plaintiffs; that on March 11, 1952, Robert L. Lantz was operating the insured automobile and a collision occurred resulting in a number of losses; that some of the defendants claim damages for bodily injuries; that the defendant, Carol M. Yoder, recovered a judgment against Robert L. Lantz in an Indiana State Court on January 5, 1955, in the sum of Thirty-One Thousand ($31,000.00) Dollars; that the plaintiffs refused to pay the judgment and to pay any other claims arising out of the collision; that Ezra Lantz had no insurable interest in the insured automobile after February 16, 1952, and on March 11, 1952, the insurance policy was not applicable to the collision which occurred.

No motion was filed by any of the defendants under Rule 52(b), F. R. C. P., seeking amended or additional findings nor was the sufficiency of the evidence to support the findings raised by the defendants on their appeal to the Court of Appeals.

The trial judge concluded that the law was with the plaintiffs on their complaint and the cross-complaint Carol

M. Yoder filed in her State Court judgment; that the plaintiffs were entitled to a judgment; that the automobile in question was not covered by the insurance policy and did not apply to the collision of March 11, 1952; and, that the plaintiffs are not liable to any of the defendants by reason thereof.

The defendants, Lantz, Yoder, Myers and Miller, perfected a timely appeal to the United States Court of Appeals for the Seventh Circuit. The appeal was submitted on the original record and briefs. The appellants' brief contained no appendix. The appellees' brief contained an appendix which set forth the pleadings, the stipulation of facts, the findings of fact and conclusions of law, the opinion and judgment of the District Judge. After oral argument and on June 27, 1957, the Court of Appeals reversed the judgment of the District Court with respect to the liability claimants and affirmed with respect to the collision claimants. The Court of Appeals also directed the District Court to enter judgment for Carol M. Yoder on her counterclaim in the sum of Fifteen Thousand ($15,000.00) Dollars and costs and attorneys' fees to be fixed by the District Judge.

The plaintiffs presented a timely Petition for Rehearing which the Court of Appeals denied on August 6, 1957.

This Petition for Writ of Certiorari has been filed within 90 days from August 6, 1957.

F. ARGUMENT.

1. The Court of Appeals misquoted the evidence, weighed the evidence, and decided the appeal on facts, which the District Judge did not find as facts, all of which it had no jurisdiction or power to do.

The District Judge decided this case by findings of fact and conclusion of law pursuant to the provisions of Rule 52, F. R. C. P. No motion was filed under Section (b) of the rule seeking amendment of or additions to the findings. No question was ever raised as to the sufficiency of the evidence to sustain the District Judge's findings of fact in the trial court or on appeal to the Court of Appeals. As a matter of fact, in their brief before the Court of Appeals, the defendants stated the facts contained in the stipulation of facts entered of record in the trial court and contained in the Court's findings of fact and added two more which were not included in the trial judge's findings of fact but which it was contended the evidence established, *i. e.*, that Grace Blosser, plaintiffs' agent, knew Robert L. Lantz was a minor when she issued the policy to Ezra Lantz, and charged an additional premium because he was going to drive the car, and, that Robert L. Lantz was a minor and continued to live in the residence of his father, Ezra Lantz. Nowhere in their statement of facts did the defendants include as facts, not found by the trial judge but established by the evidence, that Robert L. Lantz was the owner of the car; that because he was a minor his father took the title in his, the father's, name; and, that Grace Blosser issued the policy to the father knowing this to be true. This was the theory of their defense as evidenced by their answers filed to the plaintiffs' complaint.

In its opinion, the Court of Appeals recites the stipulated facts deemed relevant by it and then recites additional facts "established" upon trial in the District Court, including the following:

> "• • • Ezra Lantz testified, without contradiction, that, when the car was being purchased, he talked to Grace Blosser, plaintiffs' agent, about the circumstances of Robert's age and the desire of having a policy. She thereupon issued the policy in Ezra's name and charged an additional premium"; and "Moreover, all of the facts in regard to the purpose of the issuance of the policy to the father *and not to the son* were made known to plaintiffs' representative before the policy was written."

By the citations of *Truck Insurance Exchange* v. *Hanson*, 254 P. 2d 494, and *Commonwealth Casualty Co.* v. *Arrigo*, 160 Md. 595; 154 A. 136, 138, and its quotation from that opinion at pages 34-35 of its opinion, it is obvious that the Court of Appeals based its reversal of the District Court's decision upon a finding that the insured automobile was the property of Robert L. Lantz and its title and insurance were placed in Ezra Lantz' name because Robert was a minor, all of which the plaintiffs' agent knew. But, the record does not support this finding. The testimony of witnesses, Blosser, Ezra Lantz and Robert L. Lantz, is incorporated in paragraph E. of this petition to establish the absence of any testimony to support such findings by the Court of Appeals. On the contrary, the only evidence in the record speaking to the point is the insurance policy (Exhibit 1) which declares Ezra Lantz to be the sole owner• and the testimony of Grace Blosser that Ezra Lantz did not tell her that the car was Robert Lantz' (p. 5). The District Judge accordingly did not find the

• The meaning of the words "sole owner" in an Indiana insurance policy is clear. *Automobile Underwriters* v. *Tite*, 1948, 119 Ind. App. 251; 85 N. E. 2d 365.

allegations of the defendants' answers to be true. He was not required to make a finding asserting the negative of each issue of fact raised by the answer.

Weber v. *McKee*, 1954, 5 Cir., 215 F. 2d 447.

Carr v. *Yokohama Specie Bank, Ltd.*, 1952, 9 Cir., 200 F. 2d 251.

This is the rule announced by the Court of Appeals for the Seventh Circuit.

Shapiro v. *Rubens*, 1948, 7 Cir., 166 F. 2d 659, 667.

Walling v. *Plymouth Mfg. Corp.*, 1944, 7 Cir., 139 F. 2d 178; Cert. Den., 64 S. Ct. 1144; 322 U. S. 741; 88 L. Ed. 1574.

Container Patents Corp. v. *Stout*, 1944, 7 Cir., 143 F. 2d 170; Cert. Den., 65 S. Ct. 71; 323 U. S. 734; 89 L. Ed. 588.

The Court of Appeals must not set aside the District Court's findings of fact where no question is raised as to their completeness, correctness, or the sufficiency of the evidence to sustain them, and, where they are opportunely attacked as required by Rule 52, which was not done here, they shall not be set aside unless clearly erroneous.

McAllister v. *U. S.*, 1954, 75 S. Ct. 6; 348 U. S. 19; ..... L. Ed. .....

United States v. *National Assoc. of Real Estate Boards*, 1950, 339 U. S. 485; 70 S. Ct. 711; 94 L. Ed. .....

United States v. *Fotopulos*, 1950, 9 Cir., 180 F. 2d 631.

Shapiro v. *Rubens*, 1948, 7 Cir., 166 F. 2d 659.

And the Court of Appeals has no jurisdiction to find facts which the District Court does not find.

Bowles v. *Hayes*, 1946, 3 Cir., 155 F. 2d 351.

Gotham Silk Hosiery Co. v. *Artcraft Silk Hosiery Mills*, 1945, 3 Cir., 147 F. 2d 209, 222.

This departure from the accepted and usual course of judicial proceedings under Rule 52 indicates a misunderstanding of the provisions of that Rule or an usurpation of powers in disregard of the Rule. In effect, litigants are afforded a trial *de novo* in the Seventh Circuit in cases tried before a District Court without a jury.

The Supreme Court has the power to supervise the application of Rule 52 by the Courts of Appeal so there will be uniformity between Circuits.

> *Warner* v. *New Orleans*, 1897, 17 S. Ct. 892; 167 U. S. 467; 42 L. Ed. 239.

and so there will be no radical departures from the accepted and usual course of judicial proceedings.

> *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 1949, 69 S. Ct. 535; 336 U. S. 271; ..... L. Ed. .....
>
> Rule 19.1.(b), Supreme Court Rules.

The petitioners respectfully invoke the exercise of that power, so that Rule 52 will have the same application in the Seventh Circuit as it has elsewhere and so that the function of fact finding will be restored to the trial judge in the District Courts of Indiana, Illinois and Wisconsin.

2. The Court of Appeals applied Illinois law holding that the use of the insured automobile rather than ownership was material to the risk to reverse the District Court's holding that, under Indiana law, ownership by the named insured was a prerequisite to liability under the policy.

The insurance policy (Exhibit 1) contained a provision referred to as Insuring Agreement VIII. This is a standard provision of automobile liability insurance policies in Indiana and in many other states. It read as follows:

> "This Policy applies only to accidents which occur and to direct and accidental losses to the automobile

which are sustained during the Policy Period, while the automobile * * * is owned * * * for the purposes stated as applicable thereto in the Declarations."

All the right, title and interest of the defendant, Ezra Lantz, named as sole owner in the declarations forming part of the insurance policy, was transferred to his minor son, defendant, Robert L. Lantz, after the policy was issued and before any losses occurred. No notice was ever given to the company of the change in ownership. The District Judge decided that, under the law of Indiana, the insurance provided by the policy did not apply after the change in ownership, basing his decision on Insuring Agreement VIII. This decision is supported by:

Daugaard v. *Hawkeye Security Ins. Co.*, 1956, 8 Cir., 239 F. 2d 351, 353, 354.

Byrd v. *American Guarantee and Liability Ins. Co.*, 1950, 4 Cir., 180 F. 2d 246, 248, 249.

Rothberg v. *Schmiedeskamp*, 1956, Mass., 134 N. E. 2d 544, 546.

Campbell v. *Aetna Casualty and Surety Co.*; 1954, 4 Cir., 211 F. 2d 732, 735.

The Court of Appeals, in reversing, held that ownership of the insured automobile was immaterial because the policy also insured against claims arising out of its use. This is the Illinois rule.

Hawkeye-Security Ins. Co. v. *Presbitero & Sons, Inc.*, 1954, 7 Cir., 209 F. 2d 281, 283.

Mid-States Ins. Co., v. *Brandon*, 1952, 340 Ill. App. 470; 92 N. E. 2d 540.

Indiana does not have a statute such as the Illinois statute constituting the basis of the Illinois Rule. (Illinois Revised Statutes 1949, State Bar Ed., Chap. 73, Sec. 766.) In Indiana, insurance contracts, like contracts of other

kinds, are construed and applied according to the popular and usual significance of the language used,

Shedd v. *Automobile Ins. Co.*, 208 Ind. 621, 628; 196 N. E. 227.

Hoosier Mutual Auto Ins. Co. v. *Lanam*, 1923, 79 Ind. App. 629; 137 N. E. 626.

Metropolitan Life Ins. Co. v. *Alterovitz*, 1938, 214 Ind. 186; 14 N. E. 2d 570.

and Insuring Agreement VIII must be given effect in interpreting the insurance policy (Exhibit 1) as it was given effect in the *Daugaard*, *Byrd* and *Rothberg* cases.

In the Court of Appeals, three judges heard the argument and decided the appeal. All three judges were appointed from Illinois. At the time, there was only one judge on the Court of Appeals from Indiana and he was totally incapacitated by a heart ailment. The background of the Illinois judges was plainly evidenced in the Court's opinion in this case. The similarity between the opinion in this case and the opinion of Presiding Judge Lowe of the Appellate Court of Illinois in the *Brandon* case is remarkable. On the other hand, the District Judge has been an Indiana judge for twenty (20) years and a member of the Indiana Bar for more than twenty (20) years. His determination of what the Indiana law is was entitled to special weight.

Bernhardt v. *Polygraphic Company of America, Inc.*, 1956; 350 U. S. 198; 76 S. Ct. 273; ..... L. Ed. .....

Gardner v. *State of N. J.*, 67 S. Ct. 467; 329 U. S. 565; 91 L. Ed. .....

To the extent that the decision of the Court of Appeals interprets the Indiana insurance policy under the *Hawkeye* and *Brandon* cases it is in conflict with the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188.

Because Indiana's Financial Responsibility Law (Burns' Indiana Statutes, Sec. 49-1044 *et seq.*) has in effect required all motorists to be insured and because Insuring Agreement VIII is a standard provision in automobile liability insurance policies, the Court of Appeals' decision affects the rights and liabilities of every policyholder and every insurance company writing automobile coverage in Indiana.

Petitioners, therefore, invoke the Supreme Court's power to grant certiorari under Rule 19.1.(b), Supreme Court Rules, to review this important question.

3. The Court of Appeals held that Robert L. Lantz, minor son of Ezra Lantz, the named insured, was an "assured" under the omnibus clause of the policy after transfer to him of all his father's right, title and interest in the insured automobile, which said holding was contrary to Indiana law.

The insurance policy (Exhibit 1) contained the standard omnibus clause which defined "insured" as including "any person while using the automobile • • • provided the actual use of the automobile is by the Named Insured or with his permission." The defendants contended in the District Court and in the Court of Appeals that this omnibus clause served to afford Robert L. Lantz insurance protection notwithstanding change of ownership of the insured automobile. The Court of Appeals adopted this contention and held that, even though Robert L. Lantz was the owner of the automobile on March 11, 1952, when the losses occurred, he qualified as an "insured" under the omnibus clause because he was a minor living with and under the supervision and control of his father, Ezra Lantz, the named insured. In reaching this decision, the Court of

Appeals interpreted the meaning of the word "permission" as meaning the granting of the use of the automobile to one over whose person the grantor has dominion and control rather than the granting of the use of an automobile over which the grantor has dominion and control.

This interpretation is in derogation of the law of Indiana that after the ownership of an automobile is transferred to another the transferee operates the automobile as owner and not as a permittee within the meaning of the omnibus clause.

Farm Bureau v. *Emmons*, 1952, 122 Ind. App. 440; 104 N. E. 2d 413.

Furthermore, under Indiana law, the omnibus clause does not serve to extend coverage to risks excluded elsewhere in the policy,

Culley v. *Farm Bureau*, 1946, 224 Ind. 483; 69 N. E. 2d 219,

which would include the prerequisite that the named insured, Ezra Lantz, remain the automobile's sole owner.

Smith v. *Western Casualty & Surety Co.*, 1943, 141 P. 2d 10.

Byrd v. *American Guarantee and Liability Ins. Co.*, 1950, 4 Cir., 180 F. 2d 246, 249.

For the same reasons assigned under Section F. 2. of this Petition, the interpretation and application of the standard omnibus clause affects every policyholder and insurer in the State of Indiana. The Court of Appeals' decision conflicts with applicable Indiana decisions as well as with the decision of the United States Court of Appeals for the Fourth Circuit in the *Byrd* case. Furthermore, the interpretation placed upon the omnibus clause is an entirely unreasonable and strained interpretation and is contrary

to Indiana law relating to the interpretation of insurance contracts.

Shedd v. *Automobile Ins. Co.*, 208 Ind. 621, 628; 196 N. E. 227.

Hoosier Mutual Auto Ins. Co. v. *Lanam*, 1923, 79 Ind. App. 629; 137 N. E. 626.

Metropolitan Life Ins. Co. v. *Alterovitz*, 1938, 214 Ind. 186; 14 N. E. 2d 570.

The petitioners, therefore, invoke the Supreme Court's power to grant certiorari under Rule 19. 1.(b), Supreme Court Rules, to review this equally important question. Wherefore, the petitioners pray this petition may be granted and order entered granting writ of certiorari.

Respectfully submitted,

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APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Indiana,
South Bend Division.

Ohio Farmers Insurance Company,
Ohio Farmers Indemnity Company

vs.

Ezra Lantz, Robert L. Lantz, Marie Yoder, Carol M. Yoder, Larry Haarer, ... Haarer, father of Larry Haarer, whose true Christian name is not known, Robert D. Myers, Imogene L. Myers, Elmer R. Miller, Betty Jane Miller, State Bank of Shipshewana, Indiana, Farm Bureau Mutual Insurance Company.

Civil Cause No. 1733.

OPINION.

This is a declaratory judgment action involving an automobile insurance policy, which was tried to the court and now solicits the decision of this court on the merits.

Upon the trial two questions were propounded to the witness, Robert Lantz, by the appearing defendants calling for a conversation with the plaintiffs' agent prior to the issuance of the policy in suit, to which the plaintiffs objected and the court reserved its ruling thereon. The record in this regard is as follows:

"Q. What did you tell her with reference to the title to this automobile?

Mr. Obenchain: To which we will object if the effect of the evidence is to vary or change the terms of the written policy.

The Court: Let the record show the Court reserves its ruling. The Court will hear the evidence at this time. You may answer.

A. I told her that I wasn't old enough to have the title in my name, myself, so my father signed the title for me.

Q. What, if anything, did Mrs. Blosser say in that regard?

Mr. Obenchain: To which we will object if the purport of it is intended to change or vary the terms of the written instrument.

The Court: Let the record show the court reserves its ruling.

A. She said there would be additional charge, being that I wasn't old enough to have the car in my name."

It is the law in Indiana, which here applies, that when a contract is reduced to writing, and this includes an insurance policy, the entire contract, as finally settled, is embraced therein, and all oral negotiations and stipulations between the parties which preceded or accompanied the execution thereof are to be regarded as merged therein, and it is to be treated as the exclusive medium of ascertaining the contract by which the parties bound themselves, and parol testimony can not be received to contradict or vary the terms thereof. *King* v. *The Enterprise Insurance Co.* (1873), 45 Ind. 43; 57 and 58.

The insurance policy had been introduced in evidence and stipulated that Ezra Lantz was the sole owner of the automobile insured and, therefore, the objections of the plaintiffs must be sustained and this evidence can not and will not be considered by the court.

The facts are that on May 7, 1951 the plaintiffs issued a policy on a 1947 Chevrolet automobile to the defendant, Ezra Lantz, as the sole owner, with premium due on issu-

ance and on November 6, 1951 which were paid; that on February 16, 1952, as stipulated in evidence by the parties, the defendant, Ezra Lantz, transferred and conveyed to the defendant, Robert L. Lantz, all of his right, title and interest in the automobile covered by the insurance contract, and thereafter, on March 11, 1952, the defendant, Robert L. Lantz, was operating said automobile and a collision occurred resulting in damages having been sustained by the appearing defendants for which they claim the plaintiffs are liable under the policy issued.

The policy and the broad coverage endorsement thereto attached, in applicable part, provide,

> "This Policy applies only to accidents which occur while the automobile is owned, maintained, and used for the purposes stated as applicable thereto in the Declarations."

In the Declaration it was stated that the defendant, Ezra Lantz, was the sole owner of the automobile covered. Therefore, the policy did not apply to nor cover the accident which occurred on March 11, 1952, while the defendant, Robert L. Lantz, was operating the automobile after the defendant, Ezra Lantz, had transferred and conveyed all his right, title and interest therein on February 16, 1952, and the defendant, Ezra Lantz, was not the owner of said automobile, actual or constructive, legal or equitable, and there is no liability on the part of the plaintiffs under the policy by reason of the collision of March 11, 1952.

The policy did not become null and void upon the defendant, Ezra Lantz, transferring and conveying all his right, title and interest in the automobile on February 16, 1952. He had the right to make an assignment thereof with the consent of the insurer, or would have been covered had he again become the owner of the automobile during the period for which the premium had been paid. The

defendant, Ezra Lantz, having transferred and conveyed all his right, title and interest in and to the automobile prior to the collision on March 11, 1952, at the time of the collision, there was no coverage under the policy on the 1947 Chevrolet automobile therein described.

We, therefore, hold that the plaintiffs are entitled to a judgment that the plaintiffs are not liable under the insurance policy to any of the defendants to make any payments, defend any actions or pay any judgments by reason of the collision of March 11, 1952, and that the cross-complainant, Carol M. Yoder, take nothing by reason of her cross-complaint, at the costs of the defendants.

Findings of fact and conclusions of law in accord with this opinion are filed herewith and the clerk is ordered to enter judgment accordingly.

W. Lynn Parkinson,
Judge.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Indiana,
South Bend Division.

Ohio Farmers Insurance Company, Ohio Farmers Indemnity Company *vs.* Ezra Lantz, Robert L. Lantz, Marie Yoder, Carol M. Yoder, Larry Haarer, ... Haarer, father of Larry Haarer, whose true Christian name is not known, Robert D. Myers, Imogene L. Myers, Elmer R. Miller, Betty Jane Miller, State Bank of Shipshewana, Indiana, Farm Bureau Mutual Insurance Company.	Civil Cause No. 1733.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The court, having considered all of the evidence, the arguments of counsel, and the law applicable thereto, does now make the following:

FINDINGS OF FACT.

1.

This court has jurisdiction of the parties to and the subject matter of this action.

2.

On May 7, 1951, at Middlebury, Indiana, the plaintiffs and the defendant, Ezra Lantz, entered into an insurance contract insuring a 1947 Crevrolet Town Sedan bearing

serial number 1EKH9547 and motor number EAA364518, which said contract is plaintiffs' Exhibit 1 and provides as follows, to-wit:

(Photostatic copy included in original findings on file in Clerk's office.)

3.

On May 7, 1951, the title to said insured automobile was registered in the name of the defendant, Ezra Lantz, and said policy was issued to him as the sole owner thereof.

4.

On February 16, 1952, the defendant, Ezra Lantz, transferred and conveyed to the defendant, Robert L. Lantz, all his right, title and interest in and to the automobile covered by the insurance policy set out in Finding No. 2.

5.

No notice of the transfer of the title to said automobile on February 16, 1952 was given to the plaintiffs.

6.

On March 11, 1952, the defendant, Robert L. Lantz, was operating said automobile and a collision occurred with another automobile at the intersection of Highways 33 and 13 in Elkhart County, Indiana.

7.

The defendant, State Bank of Shipshewana, Shipshewana, Indiana, has no claim against the plaintiffs, or either of them, by reason of said insurance contract or the collision of March 11, 1952.

8.

A 1951 Chevrolet Coach was damaged in said collision of March 11, 1952, and by reason of such damage the defendant, Robert D. Myers, has made claim for damages against the defendants, Ezra Lantz and Robert L. Lantz, and by reason thereof the said Lantzes have demanded that the plaintiffs defend against such claim and pay and satisfy any judgment rendered thereon.

9.

The defendants, Marie Yoder, Myers and Miller, all sustained damages by reason of personal injuries and property damage as the result of said collision and have filed actions for damages against the defendants Lantz in the Elkhart Circuit Court, Goshen, Indiana, and that by reason of the filing of said actions the defendants Lantz have demanded that the plaintiffs defend them and pay any judgment rendered against them in such actions, and that all of such actions are now pending.

10.

On January 5, 1955, the defendant, Carol M. Yoder, recovered judgment against the defendant, Robert L. Lantz, in an action in the Elkhart Circuit Court, Goshen, Indiana, in the sum of Thirty-One Thousand ($31,000.00) Dollars, which said action arose out of said collision of March 11, 1952, and the said Robert L. Lantz has demanded that the plaintiffs pay and discharge said judgment which remains unsatisfied.

11.

The plaintiffs have declined and refused to defend any of the pending actions or to pay the said judgment or any

other judgments which may be rendered hereafter against the said Lantzes, or either of them, and have declined and refused to pay any collision loss or any bodily injury or property damage claims which have not been sued upon.

12.

On February 16, 1952, after the defendant, Ezra Lantz, transferred and conveyed all his right, title and interest in and to the 1947 Chevrolet automobile described in the insurance policy set out in Finding No. 2, he, Ezra Lantz, had no insurable interest in said automobile and on March 11, 1952, at the time of the collision, said policy did not apply thereto and said automobile was not insured thereunder.

Upon the foregoing findings of fact, the court does now state its

CONCLUSIONS OF LAW.

1.

This court has jurisdiction of the parties to and the subject matter of this action.

2.

The law is with the plaintiffs on their complaint.

3.

The law is with the plaintiffs on the cross-complaint of Carol M. Yoder.

4.

The plaintiffs are entitled to a judgment on their complaint that the 1947 Chevrolet automobile described in the

insurance policy set out in Finding No. 2 was not covered by said policy on March 11, 1952, and did not apply to the collision on March 11, 1952, and that the plaintiffs, or either of them, are not liable under said insurance policy to any of the defendants to make any payments, defend any actions or pay any judgments by reason of the collision of March 11, 1952.

5.

Plaintiffs are entitled to a judgment on the cross-complaint of Carol M. Yoder that the cross-complainant, Carol M. Yoder, take nothing by reason of her cross-complaint.

W. LYNN PARKINSON,
Judge.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11984 September Term, 1956 April Session, 1957.

OHIO FARMERS INSURANCE COMPANY, and OHIO FARMERS INDEMNITY COMPANY, Ohio corporations,
Plaintiffs-Appellees,
v.
EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, IMOGENE L. MYERS, ELMER R. MILLER, BETTY JANE MILLER,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

June 27, 1957

Before MAJOR, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This is an appeal from a judgment in favor of plaintiffs in an action for declaratory judgment. The judgment declared, in effect, that a 1947 Chevrolet automobile described in an insurance policy issued by plaintiffs was not covered by said policy on March 11, 1952, when the automobile was involved in a collision with another vehicle, and that plaintiffs, or either of them, are not liable under said policy to any of

the defendants to make any payments, defend any actions, or pay any judgments by reason of said collision. It was also adjudged that Carol M. Yoder, a defendant, take nothing by reason of her cross-complaint, in which she sought judgment against plaintiffs for $25,000 to apply on a judgment for $31,310 which she obtained against defendant Robert L. Lantz, in the Elkhart Circuit Court, Elkhart County, Indiana, for injuries sustained by her in said collision.

On the complaint and the cross-complaint, and answers thereto, the district court tried the case without a jury. Certain relevant facts were stipulated, and are, so far as relevant here, now stated.

On May 7, 1951, plaintiffs issued said policy insuring said automobile for one year against loss by collision and bodily injury and property damage liability. The named insured was stated as Ezra Lantz, described as the sole owner. On February 16, 1952, Ezra Lantz transferred and conveyed to defendant, Robert L. Lantz, all his right, title and interest in said automobile.

On March 11, 1952, while Robert was operating said automobile, the collision above referred to occurred in Elkhart County, Indiana, resulting in damage to the automobile. Defendants Yoder, Myers and Miller all sustained damages by reason of personal injuries and property damage, and filed suits thereon against the defendants Lantz; and defendant Carol M. Yoder recovered judgment against Robert as aforesaid.

Plaintiffs have refused to defend any actions or to pay any judgments rendered by reason of the above facts and have refused to pay collision loss or any bodily injury or property damage claims which have not been sued upon.

Relevant parts of the policy are now set forth below.

In the declarations on page 1, *inter alia*, there appear:

Item 1. Name of Insured Ezra Lantz

Item 5. The purposes for which the automobile is to be used are Pleasure and Business

Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the Named Insured is the sole owner of the automobile, except as herein stated:
Sole Owner

In the insuring agreements on page 2, the following, *inter alia*, appear:

I. Coverage E-1—Collision or Upset:

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the Declarations as applicable thereto.

Coverage H—Bodily Injury Liability:

To pay on behalf of the Insured, all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, • • • sustained by any person, caused by accident and arising out of the ownership, maintenance *or* use of the automobile.

Coverage J—Property Damage Liability:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance *or* use of the automobile.

(Italics supplied for emphasis.)

III. Definition of Insured:

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes the Named Insured and

also includes any person while using the automobile * * * provided the actual use of the automobile is by the Named Insured or with his permission. * * *

On page 4 appear the following conditions:

20. CHANGES: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed except by endorsement issued to form a part of this Policy, signed by the President, a Vice President, Secretary, Assistant Secretary or Treasurer of the Company and countersigned by a duly authorized agent of the Company.[1]

Upon the trial in the district court it was established that Robert L. Lantz became 18 years of age on May 24, 1951, and Ezra Lantz testified, without contradiction, that, when the car was being purchased, he talked to Grace Blosser, plaintiff's agent, about the circumstances of Robert's age and the desire of having a policy. She thereupon issued the policy in Ezra's name and charged an additional premium. She was also told that the purchase of the car was financed at a local bank, where both Ezra and Robert signed a note. Thereafter Robert paid to Mrs. Blosser the premiums on this policy in monthly payments.

1. There is attached to the policy a rider entitled "Broad Coverage Endorsement". Included therein is the following:

Territorial Limits Extended:

3. INSURING AGREEMENT VIII—POLICY PERIOD, TERRITORY, PURPOSE OF USE.

This Insuring Agreement is amended to read as follows: "This Policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the Policy Period, while the automobile is in North America, or the territories or possessions of the United States of America, or is being transported between ports thereof, and is owned, maintained *and* used for the purposes stated as applicable thereto in the Declarations." (Italics supplied for emphasis.)

At the time of the accident, and prior thereto, Robert was living with his father and was under his supervision and control.

Finding No. 12 by the district court is as follows:

> "On February 16, 1952, after the defendant, Ezra Lantz, transferred and conveyed all his right, title and interest in and to the 1947 Chevrolet automobile described in the insurance policy set out in Finding No. 2, he, Ezra Lantz, had no insurable interest in said automobile and on March 11, 1952, at the time of the collision, said policy did not apply thereto and said automobile was not insured thereunder."

The district court's conclusion of law No. 4 reads:

> "The plaintiffs are entitled to a judgment on their complaint that the 1947 Chevrolet automobile described in the insurance policy set out in Finding No. 2 was not covered by said policy on March 11, 1952, and did not apply to the collision on March 11, 1952, and that the plaintiffs, or either of them, are not liable under said insurance policy to any of the defendants to make any payments, defend any actions or pay any judgments by reason of the collision of March 11, 1952."

It appears from the opinion filed by the district judge that he based his decision on the ground that the transfer by Ezra to Robert of the ownership of the car prevented the policy from covering the accident of March 11, 1952. It is apparent that he was led to that conclusion by finding of fact No. 12 that Ezra had no insurable interest in said automobile at the time of the collision.

1. It is true that to support an action on a policy which insures a property right, *i.e.*, against collision, fire, wind or theft, etc., an insurable interest in the named insured must be proved. On the other hand, where an insurance policy is one of indemnity against liability for loss and injury sustained by others and caused by the use of

an automobile or other property named in the policy, an insurable interest in the named insured is not a prerequisite to a recovery against the insurer.

There is a marked difference between a contract of insurance against loss and one against liability. 44 C.J.S. 482: *Slavens* v. *Standard Acc. Ins. Co.*, 27 F.(2d) 859, 861; *Michel* v. *American Fire & Casualty Co.*, 82 F.(2d) 583, 586, and *Ohio Casualty Ins. Co.* v. *Beckwith*, 74 F.(2d) 75, where the court, at 77, said that the distinction between these two types of insurance is of long standing and is well-recognized.

In the policy in the case at bar coverages H and J both embrace damages "arising out of the ownership, maintenance, *or* use of the automobile". (Italics supplied for emphasis.) Thus the policy recognizes and includes in its coverage, not only damages inflicted and arising out of the ownership or maintenance of the automobile, but also arising out of its use.

This coverage was afforded Ezra as the named insured. That coverage is extended, by the policy's definition of "insured", to include any person using the automobile with the permission of Ezra, the named insured. 45 C.J.S. 894. There is no doubt, and it is not denied, that permission was granted by Ezra to his minor son to use the car in question. There is no evidence that this permission was ever withdrawn, although up to and at the time of the collision the son was still a minor and was still living with and under the supervisory control of his father, Ezra. Ownership of the automobile either by the father or the son is irrelevant on the question of the liability risks assumed in this policy.

Moreover, all of the facts in regard to the purpose of the issuance of the policy to the father and not to the son were made known to plaintiffs' representative before the

policy was written. In that respect, the language in *Commonwealth Casualty Co.* v. *Arrigo*, 154 A. 136, 138,[2] is in point:

> "In this case, Wallace, the solicitor and local agent of the defendant company, was informed that the truck was the property of Oliver and not the property of Malone, and the reason for placing the title of the truck in the name of Malone was told to him, and he, in making out the application, knowing these facts inserted therein the name of Malone as the sole owner of the truck. This constituted a waiver and rendered the defendant company liable under the policy * * *."

and, at 139:

> "* * * It is not shown, nor is it claimed, that the risk or hazard was in any wise increased or made greater by placing the title of the car in the name of Malone, and not in Oliver, and in taking the insurance in the name of Malone. In any event, this was done with the full knowledge of the agent of the company and not with the purpose or object of defrauding it. * * *"

Such knowledge of an agent is attributable to the insurer. *Nat. Mutual Ins. Co.* v. *Bales*, 81 Ind. App. 302, 306, 139 N.E. 703, 704.

In *Truck Ins. Exch.* v. *Hanson*, 254 P.2d 494, 42 Wash. 2d, 256, where a liability insurance policy protected a father against any judgment secured against him arising out of the ownership, maintenance or use of a truck purchased by his minor son, it appeared that the agent of the insurer knew of the reasons for the naming of the father as the insured. Following an accident while the son was driving, a suit for damages for injuries sustained by third persons was brought against the minor as well as his father, who tendered the defense of the action to the

2. This case is also reported in 160 Md. 595.

insurer. The trial court held the policy invalid upon the ground that the father did not have an insurable interest in the truck. The court said, at 495:

> "• • • It is, therefore, immaterial whether he had a financial interest in it or not. The contingency against which the father is insured under the terms of the policy, is liability to third persons arising out of the ownership, maintenance *or* use of the truck. It is axiomatic that any one has a financial interest in protecting himself against liability arising out of the use of any instrumentality."

It was held that the trial court erred in ruling that the father had no insurable interest in the contingency described in the policy, meaning the liability to third persons. To the same effect is *Commonwealth Casualty Co.* v. *Arrigo, supra,* at 137. See also *Mid-States Ins. Co.* v. *Brandon*, 340 Ill. App. 470.

For the reasons aforesaid we hold that, so far as coverages H and J are concerned, the presence of an insurable interest in Ezra Lantz, at the time the policy was issued or at the time of the collision, was not essential to a recovery against plaintiffs and that the district court in that respect erred in its judgment.

2. In this court, defendants have not contended that plaintiffs are liable under the policy to either Ezra Lantz or Robert Lantz for loss of or damage to the 1947 Chevrolet automobile, resulting from the collision on March 11, 1952. Therefore, insofar as the judgment from which this appeal was taken pertains to such loss or damage to said automobile, that judgment is affirmed. In all other respects it is reversed and this cause is remanded to the district court to enter a judgment declaring the rights of the parties as herein determined, insofar as coverages H and J in the policy are concerned, and also a judgment in favor of cross-complainant Marie Yoder for $15,000, ac-

crued interest thereon, and costs of suit. The district court, on remand, shall also consider cross-complainant's prayer for the allowance of reasonable attorneys' fees, and, if it determines that she is entitled to such allowance, it shall fix the amount thereof and include it in said judgment in her favor.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

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JOHN T. FEY, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

NO. 499

OHIO FARMERS INSURANCE COMPANY,
OHIO FARMERS INDEMNITY COMPANY,

Petitioners and Appellees below,

vs.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, IMOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,

Respondents and Appellants below.

On Petition for a Writ of Certiorari to The United States Circuit Court of Appeals for The Seventh Circuit.

Brief for Respondents in Opposition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 409

OHIO FARMERS INSURANCE COMPANY,
OHIO FARMERS INDEMNITY COMPANY,
Petitioners and Appellees below,

VS.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, DIOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,
Respondents and Appellants below.

On Petition for a Writ of Certiorari to
The United States Circuit Court of Appeals for
The Seventh Circuit.

Brief for Respondents in Opposition

A. This case is reported in 145 F. Supp. 770, and 246 F. 2d 182. The District Court's opinion appears in Appendix A at page 191 of the petition. The Court of Appeals opinion appears in Appendix B at page 281 of the petition.

B. (i) The judgment of the Court of Appeals was rendered and entered on June 27, 1957.

(ii) The Court of Appeals denied Petition for Rehearing on August 6, 1957.

(iii) The United States Supreme Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under the provisions of Section 1254 (1), Title 28, United States Code, which provides as follows:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C. There are presented for review two questions:

1. Did the Circuit Court of Appeals act within the scope of its reviewing authority in reversing the Federal District Court?

2. Whether an insurance carrier, under a liability policy containing an omnibus clause, can deny liability under the policy due to the acts of negligence of a person operating the motor vehicle upon the basis that title to the motor vehicle had been transferred, without notice to the insurer, from the named insured to the driver of the automobile when the insurer at the time of issuing the policy had knowledge that the driver would be one of the persons operating the motor vehicle and had charged an additional premium for this risk when the driver, a minor child, at the time of the issuance of the policy and at the time of the accident was under the supervision and control of the named insured.

D. There are no constitutional provisions, treaties, statutes, ordinances, or regulations affecting the questions presented.

E. This action was commenced in the United States District Court for the Northern District of Indiana, South Bend Division, on February 11, 1955. The plaintiffs are

Ohio corporations having their home officers in LeRoy, Ohio, and the defendants are all citizens and residents of Indiana. The plaintiffs sought a declaratory judgment with respect to the applicability of an automobile liability insurance policy issued to the defendant, Ezra Lantz, to losses which occurred March 11, 1952, after the named insured had transferred all his right, title and interest in the automobile to his minor son without the companies' knowledge or approval. The District Judge entered judgment for the plaintiffs on November 15, 1956, after trial by the court sitting without a jury. Findings of Fact and Conclusions of Law under Rule 52, F.R.C.P., were filed the same date. The issues were submitted in part upon the stipulation of the parties which established: That the Court had jurisdiction of the parties and the subject matter of the action; that on May 6, 1951, the plaintiffs and the defendant, Ezra Lantz, entered into a written insurance contract, appearing as Exhibit 1 in the record, which declared Ezra Lantz to be the sole owner of the automobile insured and which contained standard provisions respecting transfer of the automobile and insurance policy; that on February 16, 1952, Ezra Lantz transferred all his right, title and interest in the insured automobile to the defendant, Robert L. Lantz; that on March 11, 1952, the defendant, Robert L. Lantz, operated said insured automobile into collision with another at the intersection of Highways 33 and 13 in Elkhart County, Indiana, and, other facts pertaining to the demands made by the defendants upon the plaintiffs arising out of said collision.

The pertinent parts of the policy issued by the plaintiffs are as follows:

In the declarations on page 1, *inter alia*, there appear:

Item 1.	Name of Insured	*Ezra Lantz*
Item 5.	The purposes for which the automobile is to be used are	*Pleasure and Business*

Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the Named Insured is the sole owner of the automobile, except as herein stated: *Sole Owner*

In the insuring agreements on page 2, the following, *inter alia*, appear:

I. Coverage E-1—Collision or Upset:

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the Declarations as applicable thereto.

Coverage H—Bodily Injury Liability:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, • • • sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage J—Property Damage Liability:

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

III. Definition of Insured:

With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes the Named Insured and also includes any person while using the automobile • • • • provided the actual use of the automobile is by the Named Insured or with his permission. • • • •

On page 4 appear the following conditions:

20. Changes: Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed except by endorsement issued to form a part of this Policy, signed by the President, a Vice-President, Secretary, Assistant Secretary or Treasurer of the Company and countersigned by a duly authorizer agent of the Company.

There is attached to the policy a rider entitled "Broad Coverage Endorsement". Included therein is the following:

3. *Insuring Agreement VIII—Policy Period, Territory, Purpose of Use.*

TERRITORIAL LIMITS EXTENDED

This Insuring Agreement is amended to read as follows:

"This Policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the Policy Period, while the automobile is in North America, or the territories or possessions of the United States of America, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations."

- - - - - - - - - -

The testimony of the plaintiffs' witness, Blosser, and the defendants' witnesses, Ezra Lantz and Robert L. Lantz, is substantially as set forth in the petition.

No motion was filed by any of the defendants under Rule 52 (b), F.R.C.P., seeking amended or additional findings, but the question of the sufficiency of the evidence to

support the findings and the question of the court's conclusions based upon the findings were raised by the defendants on their appeal to the Court of Appeals.

The trial judge concluded that the law was with the plaintiffs on their complaint and against the cross-complainant, Carol M. Yoder; that the plaintiffs were entitled to a judgment; that the automobile in question was not covered by the insurance policy and did not apply to the collision of March 11, 1952; and, that the plaintiffs were not liable to any of the defendants because the insurable interest of Ezra Lantz had ceased.

The defendants Lantz, Yoder, Myers and Miller perfected a timely appeal to the United States Court of Appeals for the Seventh Circuit. The appeal was submitted on the original record and briefs, but contained no appendix, this requirement being waived by a timely petition for authority to appeal on the original record and by stipulation of the parties and order of the Circuit Court of Appeals. The appellees' brief contained an appendix which set forth the pleadings, the stipulation of facts, the findings of fact and conclusions of law, the opinion and judgment of the District Judge. After oral argument and on June 27, 1957, the Court of Appeals reversed the judgment of the District Court with respect to the liability claimants and affirmed with respect to the collision claimants. The Court of Appeals also directed the District Court to enter judgment for Carol M. Yoder on her counter-claim in the sum of Fifteen Thousand Dollars ($15,000.00) and costs and attorney's fees to be fixed by the District Judge.

The plaintiffs presented a timely Petition for Rehearing which the Court of Appeals denied on August 6, 1957.

The Petition for Writ of Certiorari has been filed within 90 days from August 6, 1957.

F. ARGUMENT

1. The petitioners seek writ of certiorari based upon their contention that the Circuit Court of Appeals has misapplied Rule 52 of the Federal Rules of Civil Procedure and that the intervention of the Supreme Court is necessary to create uniformity between the Circuits in the application of this Rule and so that there will be no radical departure from the accepted and usual course of judicial proceedings.

Respondents do not agree that the Circuit Court of Appeals misapplied Rule 52, but contend that petitioners have failed to correctly construe the intended application of the Rule in the light of the circumstances of this particular case.

The proper application of Rule 52 can be determined only by giving consideration to the following circumstances of this case:

a. The evidentiary facts were not in dispute upon appeal of this case to the Circuit Court of Appeals nor are they now in dispute.

b. The appeal to the Circuit Court of Appeals was made on the entire record before the District Court, including a complete transcript of the evidence, both written and oral.

c. The "finding" by the District Judge, upon which he based his decision, that Ezra Lantz had no insurable interest in the subject automobile at the time of the collision in question, was actually a conclusion of law, or at least a mixed question of law and fact.

d. The case was tried in the District Court, without a jury.

Petitioners argue that the Circuit Court of Appeals had no authority to set aside the District Court's findings of fact because respondents filed no motion to amend the findings in the District Court, and no question was raised as to the sufficiency of the evidence to sustain the District Judge's findings of fact in the Trial Court or on appeal to the Court of Appeals. The cases cited by the petitioners to support this contention are set forth at page 12 of Petition and Brief of the Petitioners. None of the cases cited support this conclusion. Those cases rather dealt with the "clearly erroneous" rule pertaining to the application of Rule 52 which is discussed below.

Respondents respectfully point out that sub-section (b) of Rule 52 clearly states: "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment. Rule 52 (b) Federal Rules of Civil Procedure."

It is sufficient, under the uniform application of Rule 52 that the Circuit Court of Appeals be apprised of the objections of the appellant upon the appeal.

Monagham v. *Hill* (1944) 9 Cir. 140 Fed. (2nd) 31, 33.

In re: Imperial Irr. Dist. (1941) 9 Cir. 38 Fed. Supp. 770. Affirmed 136 Fed. (2nd) 539 Certiorari denied 64 S. Ct. 784 321 U.S. 787, 88 L. Ed. 1078 Rehearing denied 64 S. Ct. 940 322 U.S. 767, 88 L. Ed. 1593.

Bingham Pump Co., Inc. v. *Edwards* (1941) 9 Cir. 118 Fed. (2nd) 338, 340.

Penmac Corp. v. *Esterbrook Steel Pen Mfg. Co.* (1939) D.C.N.Y. 27 F. Supp. 86, 93.

On the trial in the District Court the issue as to insurable interest in Ezra Lantz was sharply drawn in the pleadings and in the proposed findings of fact and conclusions of law submitted by the parties. Upon appeal appellants assignment of error in the District Court's findings was clearly drawn and brought before the Circuit Court of Appeals by appeal on the entire record and specifications in the appellant's brief.

The petitioners further contend that the Court of Appeals had no authority to set aside the facts found by the District Court and they contend further that the Circuit Court of Appeals exceeded its reviewing authority by making its own findings.

Respondents respectfully point out that the authorities cited by petitioners do not have application to the circumstances of the instant case. To begin with, the Supreme Court has spoken clearly to the effect that under Rule 52 (a) findings of fact in actions tried without a jury may be set aside and the trial court reversed where, although there is evidence to support the finding, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. *United States Gypsum Co.* (1947) 333 U.S. 364, 395, 68 S. Ct. 525 92 L. Ed. 746.

Cullers v. *Commissioner of Internal Revenue* (1956) 8 Cir. 237 Fed. (2nd) 611, 617.

Daniel v. *First National Bank of Birmingham* (1955) 5 Cir. 227 Fed. (2nd) 353 Rehearing denied (1956) 228 Fed. (2nd) 803, 805.

That the Circuit Court of Appeals determined from a review of the entire evidence that a mistake had been committed by the District Judge is apparent from the Court's written decision wherein it is stated:

"It appears from the opinion filed by the district judge that he based his decision on the ground that

> the transfer by Ezra to Robert of the ownership of the car prevented the policy from covering the accident of March 11, 1952. It is apparent that he was led to that conclusion by finding of fact No. 12 that Ezra had no insurable interest in said automobile at the time of the collision." (Page 5 of the written decision of the Circuit Court of Appeals).

It is also clear from the above, that this together with the conclusion that the insurer had knowledge of the risk involved and charged an additional premium for the same, constituted the basis for the reversal of the District Court by the Circuit Court of Appeals and statements to the contrary by petitioners are mere assumptions unsupported by a careful review of the decision of the Circuit Court of Appeals.

Furthermore, the argument by petitioners that Rule 52 would not permit the Circuit Court of Appeals setting aside the District Judge's findings of fact has no application in the case at hand, because the particular finding set aside was actually a conclusion of law or a mixed question of law and fact. The finding, as set forth above, involved a question of insurable interest in Ezra Lantz. The point now raised by petitioner was not raised in the Circuit Court of Appeals, and thus was not covered in that Court's written decision. Had it been raised, the court would undoubtedly have followed the holding made by the same Court in the case of *General Accident Fire and Life Assurance Corp* v. *J. Roy Browne, et al.* (1954) 7 Cir. 217 Fed. (2nd) 418, wherein the point involved was determination of a person acting as agent for insured. The Court through Circuit Judge Schnackenberg, who authored the decision in the instant case, held that such was not a finding of fact but rather a conclusion of law and was not covered by rule providing that findings of fact shall not be set aside unless clearly erroneous. In this the Circuit

Court for the 7th Circuit is simply applying the rule as intended and as applied in the other circuits.

Bullen v. *DeBretteville* (1956) 9 Cir. 239 Fed. (2nd) 824, 835.

Campbell Soup Co. v. *Wertz* (1948) 3 Cir. Rehearing denied (1949) 172 Fed. (2nd) 80.

Plumb Tool Co. v. *Sanger* (1952) 9 Cir. 193 Fed. (2nd) 260, 264.

Respondents also wish to emphasize that the decision of the Circuit Court of Appeals was entirely proper and in conformity with the practice and decisions under Rule 52 in view of the fact that there was no dispute concerning the evidenciary facts and under such circumstance the Court could properly arrive at its own conclusions.

Daniel v. *First Natl. Bank of Birmingham* (1955) 5 Cir. 227 Fed. (2nd) 353 Rehearing denied (1956) 228 Fed. (2nd) 803, 805.

Crutcher et al. v. *Joyce et al.* (1945) 10 Cir. Rehearing denied 146 Fed. (2nd) 518, 520.

Himmel Bros. Co. v. *Serrick Corp.* (1941) 7 Cir. 122 Fed. (2nd) 740.

And the appellate court may, under these circumstances, and with the entire record before it, draw its own conclusions as was done in this case.

Graham v. *U. S.* (1957) 9 Cir. 243 Fed. (2nd) 919, 923.

Yanish v. *Barber* (1956) 9 Cir. 232 Fed. (2nd) 939.

General Accident Fire and Life Assurance Corp. v. *J. Roy Browne, et al.* (1954) 7 Cir. 217 Fed. (2nd) 418.

It is significant that in the two cases cited by petitioners (*Bowles* v. *Hayes*, 1946, 3 Cir. 155 Fed. (2nd) 351 and *Gotham Silk Hosiery Co.* v. *Artcraft Silk Hosiery Mills*,

1945, 3 Cir. 1947, Fed. (2nd) 209, 222) the evidentiary facts before the Circuit Court of Appeals were in dispute.

Finally, respondents herein wish to emphasize that the questions raised by the petitioners and discussed above were raised by the petitioners for the first time in their petition for writ of certiorari and were not mentioned in the appellees' petition for rehearing before the Circuit Court of Appeals though ample opportunity was afforded. Prior decisions of this Court are to the effect that the Supreme Court will not review questions raised for the first time in a petition for writ of certiorari.

Helvering v. *Minnesota Tea Company* (1935) 296 U.S. 378, 80 L. Ed. 284, 56 S. Ct. 269.

Helvering v. *Tex Penn. Oil Co.* (1936) 300 U.S. 506, 81 L. Ed. 772, 57 S. Ct. 554.

2. The remaining issues in the present case are also definitely narrow and no amount of argument by the Petitioners could broaden them to the extent that they warrant review by this Court. The Indiana cases cited by Petitioners as being contrary to the ruling of the Circuit Court of Appeals are easily distinguishable upon the facts. In the case of *Farm Bureau* v. *Emmons* (1952), 122 Ind. 440, 104 N.E. (2nd) 413, the title to the motor vehicle was transferred to a complete stranger to the insurance transaction, and to a person over whom the named insured had no control or right of supervision. In the instant case, the title was transferred to one who had been accepted by the insurer as a risk and for whom additional premium had been charged. In addition, the named insured had the parental right of control and supervision of his son and the right to grant or withdraw his permission for the son to operate the motor vehicle.

The case of *Culley* v. *Farm Bureau Mutual Insurance Co.*, (1946) 224 Ind. 483, 69 N.E. (2nd) 219, turns upon the

provisions of the policy excluding coverage in those cases where the automobile was operated in violation of law as to age. The present policy contains no such prohibition, and in none of the cases cited by the Petitioners does it appear that the insurance company, through its agent, had knowledge that the person to whom the title was transferred would be the person who would be the driver of the car designated in the policy. Petitioners' flat statement that the decision they seek to have reviewed by this Court affects every policy holder and insurer in the State of Indiana is not supported by the facts. The decision of the Court of Appeals is limited to those cases where it is apparent that the insurer knew of the risk that it was accepting and knew that "use" of the motor vehicle and its "ownership" were separated from the time the policy was written. In so holding, the Circuit Court of Appeals applied the Indiana law that an insurer will be estopped from asserting a forfeiture clause in a policy, if it issues the polic knowing all of the facts.

Federal Life Insurance Co. v. *Sayre* (1924) 195 Ind. p. 7, 142 N.E. 223.

Phenix Ins. Co. of Brooklyn v. *Lorenz* (1893) 7 Ind. App. 266, 33 N.E. 444, 34 N.E. 495.

It would further appear that the decision of the Court of Appeals is amply supported by the decisions in other state courts and by prior decisions of the Seventh Circuit Court of Appeals.

Truck Insurance Exchange v. *Hanson et al* (1953) Wash. ....., 254 Pa. (2nd) 494.

Commonwealth Casualty Company v. *Arrigo* (1931) 160 Maryland 595, 154 Atl. 136, 77 A.L.R. 1350.

Mid-States Insurance Co. v. *Brandon et al* (1952) 340 Ill. App. 470, 92 N.E. (2nd) 540.

Hawkeye Security Ins. Co. v. *Presbitero & Sons et al* (1954) 7th Cir., 209 Fed. (2nd) 281.

Sly v. *American Indemnity Co. of Galveston* (1932) 127 Calif. App. 202, 15 Pac. (2nd) 522.

An analysis of these decisions indicate that the Supreme Courts of the various states and the Courts of Appeal have with uniformity held the insurer liable if the risk was one which the insurer accepted when the policy was written. It is so in this case. The uncontradicted evidence is that the insurance company knew from the start that Robert Lantz was to be the driver of the motor vehicle in question. For this risk it had charged and received an additional premium. The risk it accepted was not enlarged by the transfer of the title, since control of the vehicle remained in Ezra Lantz by virtue of his right to control the actions of his minor son.

Further, respondents contend that the Court of Appeals was clearly correct when it reversed the decision of the District Court. It is apparent from the record that the District Court entered a finding for the petitioners upon the assumption that the insurable interest had to exist in the owner of the automobile in order for the liability provisions to apply. There has long been a distinction between liability policies and policies which insure against loss of property in this respect.

An insurance policy which insures against loss of property must be supported by an insurable interest. A policy which provides indemnity against loss, by reason of liability to others, need not be supported by an insurable interest in the named insured.

Spicklemeier v. *T. M. Mastin Co.* (1940) 107 Ind. App. 350, 24 N.E. (2nd) 797.

Truck Ins. Exchange v. *Hanson et al* (1953) ..... Wash. ....., 254 Pac. (2nd) 494.
Mercer Casualty Co. of Celina, Ohio v. *Kreamer* (1937) 105 Ind. App. 358, 11 N.E. (2nd) 84.
Commonwealth Casualty Co. v. *Arrigo* (1931) 160 Maryland 595, 154 Atl. 136, 77 A.L.R. 1350.
Sly v. *Amer. Indemnity Co. of Galveston, Texas* (1932) 127 Calif. App. 202, 15 Pac. (2nd) 522.

It seems clear to respondents that the petitioners in this case have not been required by the Court of Appeals to do anything which they did not knowingly contract to do in the first instance. One of the risks which petitioners assumed and for which they charged and received an additional premium was the operation of this motor vehicle by Robert Lantz. It is observed that petitioners have failed to discuss this phase of the case, but chose to rely upon a technical interpretation of a portion of the policy which would defeat the intent of the parties.

There is no conflict of decisions. Respondents also seek review by this Court upon the theory that there is an apparent conflict of decisions between the various Circuit Courts of Appeal, citing *Daugaard* v. *Hawkeye Security Insurance Company* (1956), 8 Cir., 239 Fed. (2nd) 351, and *Byrd* v. *American Guaranty and Liability Insurance Co.* (1950), 4 Cir., 180 Fed. (2nd) 246, and *Campbell* v. *Aetna Casualty and Surety Co.* (1954), 4 Cir., 211 Fed. (2nd) 732.

Respondents suggest that the *Daugaard* case and the *Campbell* case involve the interpretation of a clause in liability policies covering the owner while driving motor vehicles other than the one described in the policy.

The *Byrd* case is distinguishable from the instant case because in that case the motor vehicle was transferred to a third person who was a stranger to the entire transaction and who had not been accepted by the insurer as a risk at the time of the collision and there were no grounds upon which it could be said that the insurer had waived the provisions of the policy.

The petitioners do not contend that there is involved any question of federal law to be reviewed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 499

OHIO FARMERS INSURANCE COMPANY, OHIO FARMERS INDEMNITY COMPANY,

Petitioners and Appellees below,

vs.

EZRA LANTZ, ROBERT L. LANTZ, MARIE YODER, CAROL M. YODER, ROBERT D. MYERS, IMOGENE L. MYERS, ELMER L. MILLER, BETTY JANE MILLER,

Respondents and Appellants below.

PETITION FOR REHEARING UNDER RULE 58(2), SUPREME COURT RULES.

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Respondents and Appellants below.

PETITION FOR REHEARING UNDER RULE 58(2), SUPREME COURT RULES.

FIRST GROUND.

On June 29, 1957, two days after the United States Court of Appeals for the Seventh Circuit decided this case, the United States Court of Appeals for the Fifth Circuit decided *Allstate Insurance Company* v. *McKenzie*, 246 F. 2d 151 (Advance Sheet published September 23, 1957), reaching the opposite result. The decisions of the United States Court of Appeals for the Seventh Circuit in this case and of the United States Court of Appeals for the Fifth Circuit in the *Allstate Insurance Company* case are in irreconcilable conflict.

SECOND GROUND.

The respondents in their answer brief at page 5 agree that the testimony of witnesses Blosser, Lantz and Lantz is correctly set forth in the petition at pages 4, 5, 6 and 7. It necessarily follows that there was no evidence that petitioners had any knowledge that the respondent, Robert Lantz, was the owner of the insured automobile and that title was taken in his father's name because he was a minor. This then is a case like *Byrd* v. *American Guarantee & Liability Insurance Company* (4 Cir.), 180 F. 2d 246, and *Allstate Insurance Company* v. *McKenzie*, 246 F. 2d 151, rather than like *Truck Insurance Exchange* v. *Hanson*, 254 P. 2d 494, and *Commonwealth Casualty* v. *Arrigo*, 160 Md. 595, 154 A. 136, 138.

CERTIFICATE.

The undersigned attorney of record does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

ROLAND OBENCHAIN, JR.,
801 Odd Fellows Building,
South Bend 1, Indiana,
Attorney for Petitioners.

CERTIFICATE.

The undersigned attorney of record does hereby certify that the grounds hereinabove stated in support of the Petition for Rehearing are believed to be of substantial and controlling effect and are confined to circumstances which have occurred since the filing of the Petition for Writ of Certiorari herein on September 23, 1957.

ROLAND OBENCHAIN, JR.,
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Attorney for Petitioners.

PRAYER.

The petitioners pray this Petition may be granted and an order entered granting rehearing of the order denying Petition for Writ of Certiorari.

Respectfully submitted,

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